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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM CHRISTOPHER SCHERER, Defendant and Appellant.	E065302 (Super.Ct.No. RIF1406545) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed as modified with directions.

Bruce L. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant William Christopher Scherer was found with methamphetamine in his possession for the purposes of sale and transportation. Pursuant to a plea to the court, defendant pleaded guilty to selling and transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)), possession of methamphetamine for sale (Health & Saf. Code, § 11378), and misdemeanor driving with a suspended license (Veh. Code, § 14601.1, subd. (a)). In return, the trial court suspended imposition of sentence and placed defendant on probation for a period of three years on various terms and conditions, including 180 days in county jail to be served on work release and payment of various fines and fees. On appeal, defendant argues five of the ordered fees were improperly imposed as conditions of probation. He further asserts the residence approval condition is unconstitutionally overbroad. For the reasons explained below, we will modify the judgment with directions.

II

FACTUAL AND PROCEDURAL BACKGROUND[1]

On April 11, 2014, at around 2:40 a.m., Riverside Police Department Officer Garcia and his partner were on routine patrol when they ran the registration of a vehicle driven by defendant. As defendant parked his vehicle in the driveway of his residence, the officers initiated a traffic stop. Upon contact with defendant, the officers discovered

[1] The factual background is taken from the preliminary hearing.

defendant's license was suspended. Officer Garcia obtained defendant's consent to search his person and found a small box in defendant's front pocket. The box contained four individual baggies of what looked like methamphetamine. The total weight of the baggies was approximately 3.5 grams. Officer Garcia also recovered $531 in cash from defendant's possession.

On September 21, 2015, an information was filed charging defendant with selling and transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1), possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 2), and misdemeanor driving with a suspended license (Veh. Code, § 14601.1, subd. (a); count 3).

On January 25, 2016, pursuant to a plea to the court, defendant pleaded guilty to all of the counts as charged. Immediately thereafter, the trial court suspended imposition of sentence and placed defendant on probation for a period of three years on various terms and conditions, including serving 180 days in county jail on work release and payment of various fines and fees.

On January 28, 2016, defendant filed a timely notice of appeal.

III

DISCUSSION

A. *Payment of Fines and Fees as Conditions of Probation*

Defendant argues the following fees and fines were improperly imposed as conditions of probation: (1) the cost of probation supervision (Pen. Code, § 1203.1b);

(2) a court operations security assessment fee (Pen. Code, § 1465.8); (3) a court conviction facilities assessment fee (Gov. Code, § 70373); (4) a drug laboratory fee (Health & Saf. Code, § 11372.5); and (5) a drug education fee (Health & Saf. Code, § 11372.7). He asserts that these five fees and fines should have instead been imposed as separate orders that could be enforced civilly.

The People respond that all five challenged fees and fines were included in a separate order and not imposed as conditions of probation, as shown on page 2 of the "Sentencing Memorandum" that was made part of the court's order. The People further argue that the drug education fee (Health & Saf. Code, § 11372.7) and the drug laboratory fee (Health & Saf. Code, § 11372.5) should have been imposed as conditions of probation because they are closely connected to defendant's crime, are mandatory, and make amends to society for the costs of drug sales.

On January 25, 2016, defendant, the defense attorney, and the trial court signed a document entitled "Sentencing Memorandum" that included both the terms and conditions of probation and additional orders of the court. The first page of the "Sentencing Memorandum" stated, "The Following Terms and Conditions Are Ordered by the Court," and the second page stated "Additional Orders of the Court." While portions of the sentencing memorandum are entitled "terms" and "conditions," the fines and fees challenged by defendant here are all included within the subheading "Additional Orders of the Court" on the second page. Without objection, the trial court incorporated the "Sentencing Memorandum" into its order.

The court's January 25, 2016 minute order placing defendant on probation stated that defendant is to "[p]ay the costs of probation supervision in an amount to be determined by the Probation Department. [¶] Based on the level of supervision, the costs will range from $591.12 to $3[,]744.00. (PC 1203.1b)." This minute order also stated that defendant is to pay "Court Operations Assessment fee of $40 imposed for each convicted charge. (1465.8 PC)" and "[p]ay conviction assessment fee for the following convicted count(s) 1 2 3. (GC 70373). [$30. each misd and felony]." This minute order further noted that defendant is to "pay a criminal laboratory analysis fee of $205.00, including assessment (HS 11372.5)" and "a drug program fee of $205.00, including fine and assessment (HS 11372.7)." These fees were indicated in the court's January 25, 2016 minute order after defendant's terms and conditions were noted.

We agree with the People that the court did not impose these fees as conditions of defendant's probation, but rather imposed them as "additional orders of the court." The record indicates that the order to pay the five challenged fines and fees was a separate order, and not a condition of probation. Nonetheless, to avoid any ambiguities, we will direct the trial court to clarify payment of these fees.

Although a trial court may order a defendant to pay for reasonable costs of probation, such costs are collateral and their payment cannot be made a condition of probation. (Pen. Code, § 1203.1b, subd. (b); *People v. Acosta* (2014) 226 Cal.App.4th 108, 126; *People v. Hall* (2002) 103 Cal.App.4th 889, 892 (*Hall*); *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321 (*Brown*).) "These costs are collectible as civil

judgments; neither contempt nor revocation of probation may be utilized as a remedy for failure to pay. (Pen. Code, § 1203.1b, subd. (d).)" (*People v. Washington* (2002) 100 Cal.App.4th 590, 592; see *Brown*, at p. 322 [An order that a probationer pay the collateral costs of probation is enforceable only as a separate money judgment in a civil action]; *People v. Hart* (1998) 65 Cal.App.4th 902, 907 (*Hart*) [same].) Thus, it is well established that the trial court may not require, as a condition of probation, payment of the cost of preparation of the probation report or the costs incurred in probation supervision. (*Hart*, at p. 907.) Any order for payment of probation costs should be imposed as a separate order. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1068.)

Likewise, "[c]ertain fines such as those relating to restitution, for example, may by statute be imposed as conditions of probation, but the court security fee is not one of them. [Citations.]" (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1402-1403 (*Pacheco*), disapproved on other grounds by *People v. Trujillo* (2015) 60 Cal.4th 850, 858, fn. 5, and *People v. McCullough* (2013) 56 Cal.4th 589, 599.) "The imposition of the court security fee as a condition of probation [is] unauthorized because like probation costs, this fee is collateral to [the defendant's] crimes and punishment and as such, its payment may not be made a condition of probation. [Citations.]" (*Pacheco*, at p. 1402.) Similarly, the court conviction facilities assessment fee under Government Code section 70373 may not be made a condition of probation. (*People v. Kim* (2011) 193 Cal.App.4th 836, 843 (*Kim*); *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1414.)

Here, it does not appear the trial court intended to impose the five challenged fees as conditions of defendant's probation. The sentencing memorandum indicates the parties' intent that these fees would be imposed as additional orders of the court, rather than conditions of defendant's probation. Likewise, in the minute order, these fees come after what appears to be the conditions of defendant's probation.

However, to the extent ambiguities exist in the trial court's minute order or sentencing memorandum in this case, we will direct the clerk to modify the minute order to clarify the payment of these fines and fees. (See *People v. Anderson* (2010) 50 Cal.4th 19, 26 [an unauthorized sentence can be modified at any time, and can be modified by the appellate court without the need for remand]; *People v. Soto* (2016) 245 Cal.App.4th 1219, 1236, fn. 10 (*Soto*) [although the defendant failed to object in the trial court, appellate court may correct unauthorized imposition of administrative costs that were imposed as conditions of probation instead of in a separate order].) Contrary to defendant's assertion, the appropriate remedy is not to strike the order to pay the challenged fees. Instead, the imposition of these fees as a condition of probation may simply be modified to be treated as "an order entered at judgment" and to be "enforced as permitted in the relevant statutes." (*Hart, supra,* 65 Cal.App.4th at p. 907; see *Hall, supra,* 103 Cal.App.4th at p. 892 ["We simply deem the requirement [to pay probation costs] an order, not a condition [of probation], and proceed to consider other aspects of the court's order"].) We therefore direct the trial court to modify the probation order to eliminate any requirement that defendant pay the costs of probation supervision, the court

operations security assessment fee, and the court conviction assessment fee as conditions of probation.

The People argue that the drug lab "fine" under Health and Safety Code section 11372.5 and the drug education "fine" under Health and Safety Code section 11372.7 should have been imposed as conditions of probation because they were closely related to the crimes defendant committed, made amends to society for the harm defendant caused, and furthered his rehabilitation. The People reason these two drug costs should be incorporated into defendant's probationary conditions because "[b]oth fines were mandatory here, imposed as a penalty on the crimes [defendant] committed, and were applicable only in this criminal context" where a defendant violates controlled substance laws unlike the "generic assessments applicable to all defendants, like the court operations and court facilities fees."

Relying on *People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*), defendant counters that the "drug lab fee" and "drug program fee" cannot be conditions of probation because these fees are not punitive and not subject to a penalty assessment.

We have found no published cases on point addressing the issue of whether payment of a drug lab fee under Health and Safety Code section 11372.5 or payment of a drug program fee under Health and Safety Code section 11372.7 can or cannot be a condition of probation. However, as pointed out by defendant, case law has developed which directly addresses whether a monetary "fine" or "fee" can be made a condition of probation. (See, e.g., *Pacheco*, *supra*, 187 Ca1.App.4th at pp. 1402-1403; *Kim*, *supra*,

193 Ca1.App.4th at pp. 842-843; *Soto, supra,* 245 Cal.App.4th at p. 1237.) These cases hold that where the purpose of the fee or fine is nonpunitive, the fine or fee is collateral to the crime and not oriented toward rehabilitation. (*Pacheco*, at 1403; *Kim*, at pp. 842-843; *Soto*, at p. 1237; see *People v. Vega* (2005) 130 Cal.App.4th 183, 194-195 (*Vega*) ["[f]ines are imposed for retribution and deterrence; fees are imposed to defray administrative costs"].) *Pacheco* noted that "[o]ne reason for the distinction between fines that may be imposed as probation conditions and those that may not is that probation 'should be oriented towards rehabilitation of the defendant and not toward the financing of the machinery of criminal justice.' " (*Pacheco*, at p. 1403.) A defendant may be imprisoned for violating a probation condition but not for violating an order to pay fees or costs. (*Ibid*.) The People apparently agree with *Pacheco*'s statement of the law, but contend the cases on "the punitive nature of the fines are not dispositive because probation conditions are not limited to punitive measures" but defendant's rehabilitation. Although we agree with the People that the purpose of probation is to assist in defendant's reformation and rehabilitation and that these fees were reasonably related to defendant's offenses, the cases on the punitive nature of fines or fees are nonetheless relevant in determining whether the drug lab fee and the drug program fee can be imposed as conditions of a defendant's probation.

Under section 1203.1, trial courts have broad discretion to impose reasonable conditions of probation that it "may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for

any injury done to any person resulting from the breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (§ 1203.1, subd. (j).)

Some fines, including restitution fines, are statutorily required to be imposed as conditions of probation. (§§ 1202.4, subd. (m), 1203.1, subd. (a)(1) & (2).) The drug lab fee and drug program fee are not expressly mentioned in a statute as appropriately imposed as a probation condition.

Health and Safety Code section 11372.5, subdivision (a), provides: "Every person who is convicted of a violation of [the offenses enumerated therein including sections 11378 and 11379] shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars ($50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law." Under subdivision (b) of that section, the money must be used to pay costs incurred by crime laboratories providing analyses for controlled substances in connection with criminal investigations, to purchase and maintain equipment used by those laboratories, and for continuing education and training of forensic scientists regularly employed by these laboratories.

Health and Safety Code section 11372.7, subdivision (a), provides in pertinent part, "[E]ach person who is convicted of [certain narcotics offenses, including a violation

of Health and Safety Code sections 11378 and 11379] shall pay a drug program fee in an amount not to exceed one hundred fifty dollars ($150) for each separate offense. The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law." The drug program fee is mandatory, provided the trial court determines the defendant has the ability to pay the fee.[2] (Health & Saf. Code, § 11372.7, subd. (b); *People v. Clark* (1992) 7 Cal.App.4th 1041, 1050.)

Subdivision (b) of section 11372.7 of the Health and Safety Code provides: "The court shall determine whether or not the person who is convicted of a violation of this chapter has the ability to pay a drug program fee. If the court determines that the person has the ability to pay, the court may set the amount to be paid and order the person to pay that sum to the county in a manner that the court believes is reasonable and compatible with the person's financial ability. In its determination of whether a person has the ability to pay, the court shall take into account the amount of any fine imposed upon that person and any amount that person has been ordered to pay in restitution. If the court determines that the person does not have the ability to pay a drug program fee, the person shall not be required to pay a drug program fee." Under subdivision (c)(2) of Health and

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[2] Defendant reported that he was a licensed general contractor. Although the trial court here did not expressly find defendant had the ability to pay the drug program fee, it found defendant had the ability to pay attorney's fees and presentence incarceration costs. The trial court impliedly found defendant had the ability to pay the drug program fee. No express finding as to a defendant's ability or inability to pay is required on the record. (Health & Saf. Code, § 11372.7, subd. (b); *People v. Turner* (2002) 96 Cal.App.4th 1409, 1414 (*Turner*); *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516 (*Martinez*); *People v. Staley* (1992) 10 Cal.App.4th 782, 785.)

Safety Code section 11372.7, at least one-third of these funds must be used for drug prevention programs in schools and the community.

Penal Code section 1464 and Government Code section 76000 mandate penalties or assessments upon every "fine, penalty, or forfeiture" imposed by a trial court in a criminal case.[3] However, such penalty assessments are not assessed or added to "fees." Accordingly, if the $50 drug lab fee imposed under section 11372.5, and/or the drug program fee imposed under section 11372.7 is actually a "fine," or a "penalty," and not a "fee," then an additional penalty assessment must be added. In this case, the trial court added penalty assessments to the drug lab fee, raising that amount to $205. The court also added a fine and penalty assessment to the drug program fee, raising that assessment to $205.

Until recently, the law was settled that both the drug lab fee and drug program fee are fines or penalties subject to imposition of penalties and assessments. Although these cases are not directly on-point in the context of payment of these costs as conditions of probation, a brief summary of this case law will help provide guidance in this case.

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[3] Penal Code section 1464, subdivision (a)(1), provides in part: "Subject to Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, and except as otherwise provided in this section, there shall be levied a state penalty in the amount of ten dollars ($10) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ."

Government Code section 76000, subdivision (a)(1), provides in part: "Except as otherwise provided elsewhere in this section, in each county there shall be levied an additional penalty in the amount of seven dollars ($7) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ."

In *People v. Sierra* (1995) 37 Cal.App.4th 1690 (*Sierra*), the Fifth District concluded that the drug program fee imposed under Health and Safety Code section 11372.7 is a "fine and/or a penalty to which the penalty assessment provisions of Penal Code section 1464 and Government Code section 76000 apply." (*Sierra*, at p. 1696.) The court reached this conclusion because Health and Safety Code section 11372.7 "defines the drug program fee as an increase to the 'total fine' and later as a fine in addition to 'any other penalty.' " (*Sierra*, at p. 1695, italics omitted.) The court stated this was "[t]he only reasonable interpretation of Health and Safety Code section 11372.7 . . . ." (*Sierra*, at p. 1696.)

A few years later, in *Martinez, supra*, 65 Cal.App.4th 1511, the Second District, Division Five, extended the reasoning of *Sierra* to conclude the drug lab fee imposed under Health and Safety Code section 11372.5 is also a fine and therefore subject to mandatory penalty assessments. (*Martinez*, at p. 1522.) The court held: "Under the reasoning of *Sierra*, we conclude Health and Safety Code section 11372.5, defines the criminal laboratory analysis fee as an increase to the total fine and therefore is subject to penalty assessments . . . ." (*Martinez,* at p. 1522; see *People v. Sharret* (2011) 191 Cal.App.4th 859, 869 (*Sharret*) ["the Legislature intended the [Health and Safety Code] section 11372.5 criminal laboratory analysis fee to be punitive"].)

In *People v. Talibdeen* (2002) 27 Cal.4th 1151 (*Talibdeen*), the California Supreme Court did not directly address whether the drug lab fee was actually a fine, but instead focused on the related issue of whether a trial court has discretion to waive

penalties under Penal Code section 1464. The court in *Talibdeen* held such penalties are mandatory. (*Talibdeen*, at pp. 1156-1157.)

The first hint that a court might determine the drug lab fee is not a fine or penalty occurred three years later, in a decision from the Second District, Division Seven in *Vega*, *supra*, 130 Cal.App.4th 183. In *Vega*, the defendants were convicted of conspiracy to transport cocaine and to possess cocaine for sale, but they were not convicted of transporting cocaine or possessing it for sale. (*Id*. at p. 185.) The issue on appeal was whether the court was authorized to impose the drug lab fee where Health and Safety Code section 11375.2 required such a fee for transporting or possessing cocaine for sale, but made no mention of a conviction for conspiracy to commit those same offenses. (*Vega*, at pp. 193-194.) The court held that because a conspiracy is punished in the same manner as the underlying felony, the dispositive question was whether the drug lab fee constituted punishment. (*Ibid*.) The court held the drug lab fee is not punishment because its purpose is not retribution or deterrence, but instead to defray the "administrative cost" of testing the purported drugs in order to secure the defendant's conviction. (*Id*. at p. 195.) Because the court held the drug lab fee was not properly imposed, it ordered the fee as well as the associated penalty assessments stricken. (*Ibid*.)

Another published case on the issue of whether the costs of drug lab and drug program are fees and not fines or penalties is *Watts*, *supra*, 2 Cal.App.5th 223, a decision from the First District, Division One. In *Watts*, the Court of Appeal first addressed whether the Supreme Court's decision in *Talibdeen* was controlling on this issue.

Stating, " '[I]t is axiomatic that cases are not authority for propositions not considered,' " the court in *Watts* at page 231 noted the defendant in *Talibdeen* never argued the assessments were inapplicable, and the Supreme Court never mentioned whether the drug lab cost was a "fee" or "fine" or "penalty." (*Watts*, at p. 231.) Noting the Supreme Court in *Talibdeen* "assumed, but never decided" the penalty applied to the drug lab fee, the court in *Watts* decided "*Talibdeen* is not authority for the proposition that penalty assessments apply to the fee." (*Watts*, at p. 231.)

Disagreeing with *Sierra* and *Martinez*, the court in *Watts* determined the Legislature intended the drug lab fee "to be exactly what it called it in the first paragraph [of Health and Safety Code section 11372.5], a fee, and not a fine, penalty, or forfeiture subject to penalty assessments." (*Watts, supra*, 2 Cal.App.5th at p. 231.) The court found support for its conclusion in Health and Safety Code section 11372.5's legislative "evolution," noting that when originally enacted in 1980, the statute "required every person convicted of an enumerated offense to, 'as part of any fine imposed, pay an increment in the amount of fifty dollars ($50) for each separate offense.' " (*Watts*, at p. 234, italics omitted.) The court in *Watts* found it significant that when this portion of the statute was later amended, the Legislature eliminated the reference to the fee's being part of the " 'fine imposed' " and renamed it from being an " 'increment' " to a " 'fee.' " (*Ibid.*) The *Watts* court also agreed with *Vega*, *supra*, 130 Cal.App.4th at page 195, that the drug lab fee is imposed to defray administrative costs, and therefore is a fee. (*Watts*, at p. 235.)

In contrast to *Vega, supra,* 130 Cal.App.4th 183 and *Watts, supra,* 2 Cal.App.5th 223, in *Sharret, supra,* 191 Cal.App.4th at page 869, the Court of Appeal, Second Appellate District, Division Five, held that the drug lab fee was in fact punitive in nature. Among other considerations, the *Sharret* court relied on the fact that the fee is imposed only upon a criminal offense, and does not apply in any civil context, that separate fees are imposed for each conviction and thus the fee "is assessed in proportion to a defendant's culpability," and that the fee is mandatory and has no ability to pay requirement. (*Sharret,* at p. 870.) The court further noted that the fund into which the fee is deposited is earmarked for criminal investigations, which has no civil purpose, and there is no evidence that the enacting legislation "was a mere budget measure" like other statutory fees. (*Ibid*.)

More recently, in *People v. Moore* (2017) 12 Cal.App.5th 558 (*Moore*), the court rejected the reasoning in *Watts* and agreed with earlier decisions that "the levy imposed under section 11372.5 constitutes a fine or penalty that is subject to penalty assessments." (*Moore*, at p. 560.) The court observed initially that "Section 11372.5 uses four different terms to refer to the same levy. . . . [S]ubdivision (a) describes the levy as a 'criminal laboratory analysis fee,' 'a fine,' an 'increment,' and a penalty to be imposed 'in addition to any other penalty prescribed by law.' [Citation.] Thus, the labels used by section 11372.5, by themselves, do not clearly answer whether the levy is a fee or a fine or penalty." (*Moore,* at pp. 563-564, italics omitted.) Nonetheless, the court reasoned that "the language of the statute and the weight of case authority" leads to the conclusion

the criminal laboratory analysis fee constitutes a fine or penalty for purposes of penalty assessments. (*Id*. at p. 570.) The court explained that such an interpretation was necessary to avoid rendering the second paragraph a "nullity" as the *Watts* court had done (*Moore*, at p. 570) and that "[e]ven if the interplay of base and total fines is imprecisely drawn, the Legislature's redundant inclusion of language granting the trial court the ability to increase the total fine in addition to any other penalty suffices to make section 11372.5 subject to penalty assessments." (*Moore*, at p. 571).

The court also rejected the conclusion in *Watts* that the statute serves an administrative purpose. The court agreed that the determination of whether a charge is a "fee" or "fine" can be made, in most cases, " 'on the basis of the purpose of the charge imposed. Fines are imposed for retribution and deterrence; fees are imposed to defray administrative costs.' " (*Moore*, *supra*, 12 Cal.App.5th at p. 564.) Unlike the courts in *Watts* and *Vega*, the court in *Moore* concluded that "Section 11372.5 appears to have the dual purposes of a fee and a fine. Subdivision (b) of section 11372.5 provides that the levy be deposited by the county treasurer in a criminalistics laboratories fund. The county may thus 'retain an amount of this money equal to its administrative cost incurred pursuant to this section.' [Citation.] Thus, subdivision (b) signals a fee purpose to the levy. Subdivision (c) proceeds to signal a fine purpose to the statute where it requires the county treasurer to 'annually distribute those surplus funds' from the criminalistics laboratories fund 'in accordance with the allocation scheme for distribution of fines and forfeitures set forth in Section 11502.' [Citation.] In other words, a portion of the levy

under subdivision (b) appears to serve the purpose of a fee and subdivision (c) treats the remainder as a fine. Neither purpose predominates over the other." (*Moore, supra,* at p. 565, fn. & italics omitted.)

Still more recently, another court has also disagreed with *Watts* and held that the laboratory analysis fee and the drug program fee are subject to penalty assessments. (*People v. Alford* (2017) 12 Cal.App.5th 964 (*Alford*).) The court in *Alford* placed heavy reliance on its view that *Talibdeen*, *supra*, 27 Cal.4th 1151 controls and that "assessments (regardless of their identification as a fee or fine) 'arising from [criminal] convictions are generally considered punishment.' " (*Alford,* at pp. 975-976.)

Relying on *Vega* and *Watts*, defendant contends the drug lab fee and drug program fee are nonpunitive in nature, and therefore cannot be imposed as conditions of probation.

Sharret, *supra*, 191 Cal.App.4th 859 cannot be reconciled with *Vega*, *supra*, 130 Cal.App.4th 183 and *Watts*, *supra*, 2 Cal.App.5th 223. Compounding the problem in this instance is the fact that *Sharret* and *Vega* are both Second Appellate District opinions.

Nevertheless, we see no reason to depart from the California Supreme Court's guidance in *Talibdeen*, *supra*, 27 Cal.4th 1151. (See also *Alford, supra,* 12 Cal.App.5th at pp. 974-975 ["First, in our view, we are governed by *Talibdeen*'s legal determination that the penalty is mandatory, even if the *Talibdeen* defendant did not specifically raise the issue presented here. . . . The *Talibdeen* court held the penalty statute assessments are mandatory after the imposition of a laboratory fee, and the high court has not issued any contrary rulings since that time. We thus find *Talibdeen* controlling under the

circumstances of this case."].) Generally speaking, even dicta from the California Supreme Court is to be followed. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) Moreover, although we agree with *Vega* that one purpose of Health and Safety Code section 11372.5 is to offset the cost of testing drugs confiscated from persons convicted of certain drug offenses, this does not mean the Legislature did not have more than one purpose in enacting Health and Safety Code sections 11372.5 and 11372.7. A fine and fee system can serve as deterrence and punishment, and help mitigate the effects of crime. These goals are not mutually exclusive. Furthermore, such multiple purposes do not evidence a legislative intent to exempt the drug lab fee and drug program fee from otherwise mandatory penalty assessments. None of the reasoning in *Watts* compels us to revise the long-settled interpretation of the drug lab fee as a fine subject to penalty assessments. (*Turner*, *supra*, 96 Cal.App.4th at p. 1414, fn. 3, & p. 1416, fn. 5 [court found the issue "settled" and reaffirmed that the drug lab fee is a fine and thus imposition of the penalty assessments mandatory].)

Indeed, even *Vega*, *supra*, 130 Cal.App.4th 183 acknowledged that "[a] cogent argument can be made from the language of Health and Safety Code section 11372.5, subdivision (a) [that] the Legislature intended the $50 laboratory 'fee' to be an additional punishment for conviction of one of the enumerated felonies." (*Id*. at p. 194.) This is because the statute refers to the " 'fee' " as a " 'fine' " which may be imposed in increments reflecting the number of offenses committed in addition to any other " 'penalty' " prescribed by law. (*Ibid*.) Furthermore, *Sharret*, *supra*, 191 Cal.App.4th

859 engaged in an exhaustive analysis of the fines and fees which may or must be imposed upon conviction and the cases interpreting them, finding no less than eight reasons for concluding that "the Legislature intended the [Health and Safety Code] section 11372.5 criminal laboratory analysis fee to be punitive." (*Id*. at pp. 869-870.)

We find *Sharret*, *supra*, 191 Cal.App.4th 859 the more persuasive of the two conflicting lines of authority and adopt its conclusion that the drug lab fee and drug program fee are punitive. Although Health and Safety Code sections 11372.5 and 11372.7 refer to the imposition of a "fee," the sections reflect the imposition of both a fine and a penalty, especially when considered with other statutes. (§§ 11372.5, subd. (a), 11372.7, subds. (a) & (b), 11502, subd. (a); Pen. Code, §§ 1205, 1464.8.) Both *Vega*, *supra*, 130 Cal.App.4th 183 and *Sharret* attempted to divine the legislative intent behind Health and Safety Code section 11372.5. While *Vega* concluded that the statute's main purpose was to defray the cost of lab testing (*Vega*, at p. 195), *Sharret* found that the statute was intended to be a punitive measure (*Sharret*, at p. 869).

Both *Vega*, *supra*, 130 Cal.App.4th 183 and *Sharret*, *supra*, 191 Cal.App.4th 859 cited the statute's specific attributes in support of their respective holdings. According to *Vega*, "[t]he legislative description of the charge as a 'laboratory analysis fee' strongly supports our conclusion, as does the fact the charge . . . does not slide up or down depending on the seriousness of the crime, and the proceeds from the fee must be deposited into a special 'criminalistics laboratories fund' maintained in each county by the county treasurer." (*Vega*, at p. 195, italics omitted.)

However, the factors cited by *Sharret*, *supra*, 191 Cal.App.4th 859 in support of its holding—the fee is imposed only on conviction of a criminal offense, it is assessed in proportion to culpability based on the number of offenses, and its imposition is mandatory and does not depend on a defendant's ability to pay—are more compelling. (*Id*. at p. 870.) Contrary to *Vega*'s description, the fee is not flat. Although it is tied to the number of offenses committed by a defendant, rather than the seriousness of each crime, it is still imposed in proportion to culpability. Furthermore, although *Vega*, *supra*, 130 Cal.App.4th 183 cites the fund into which the proceeds must be deposited, the fund has no application in a civil context (*Sharret*, at p. 870), thus supporting the conclusion that the fee constitutes punishment and completing our analysis. (See *Smith v. Doe* (2003) 538 U.S. 84, 92 ["If the intention of the legislature was to impose punishment, that ends the inquiry"].)

Bound by *Talibdeen*, *supra*, 27 Cal.4th 1151, we find *Sharret* more persuasive than *Vega* and *Watts* and reject defendant's assertions that the drug lab fee and drug program fee are not punitive in nature. Defendant appears to argue *Talibdeen* is not controlling because that case did not decide the issue directly and the Supreme Court only assumed without deciding that penalty assessments attach to the drug lab fee under Health and Safety Code section 11372.5. However, the *Talibdeen* court's language is clear: the Supreme Court stated Penal Code section 1464 and Government Code section 76000 "called for"—that is, required—imposition of penalties on the drug lab fee

imposed under Health and Safety Code section 11372.5. (*Talibdeen, supra*, 27 Cal.4th at p. 1153.)

Indeed, even the *Vega* court formulated the holding of *Talibdeen* in a manner consistent with our reading of that decision. As previously explained, in *Vega*, the Court of Appeal stated "a cogent argument" can be made that the drug lab fee is an additional punishment, and "[s]upport for this interpretation" can be found in *Talibdeen* which "held" the penalty assessments applicable to every " 'fine' " applied to the drug lab fee. (*Vega, supra,* 130 Cal.App.4th at p. 194.)

We see no reason to depart from the California Supreme Court's guidance in *Talibdeen*. In our view, *Talibdeen* controls, and the court in *Watts* has also misinterpreted *Vega*, which merely addressed whether the drug lab fee applied to the conviction in the first instance, not whether penalty assessments were properly levied on it. (*Vega*, *supra*, 130 Cal.App.4th at p. 195.) Moreover, although we agree with the *Vega* court's statement that one purpose of Health and Safety Code section 11372.5 is to offset the cost of testing drugs confiscated from persons convicted of certain drug offenses, that does not mean the Legislature may not have had more than one purpose in enacting section 11372.5, and does not make an otherwise penal statute not punitive.

A fine and fee system can serve deterrence and punishment, and help mitigate the effects of crime. These goals are not mutually exclusive—any particular assessment can seek to achieve more than one of these goals. For example, assessments could be sufficiently high to punish criminal activity with the resulting revenue used to offset the

negative effects of the crime, or help defray the cost of prosecution. Such multiple purposes do not evidence a legislative intent to exempt money mandated under either Health and Safety Code section 11372.5 or 11372.7 from the mandatory penalties.

As to the penalties assessed on the drug program fee (Health & Saf. Code, § 11372.7), we find the reasoning in *Sierra* and *Martinez* to be persuasive and conclude that penalty assessments are also applicable to the drug program fee. A minimum of one-third of the money collected under this statute must be used for drug prevention programs in schools and the community. (Health & Saf. Code, § 11372.7, subd. (c)(2).) As such, the funds are not designed to compensate the government for the cost of prosecuting any particular defendant, and therefore are not fees, but instead are additional punishment.

Accordingly, we deem the drug lab fee under Health and Safety Code section 11372.5 and the drug program fee under Health and Safety Code section 11372.7 to be a "punishment" such that these fees can be imposed as a condition of defendant's probation in this case.

B. *Residence Approval Condition*

As a condition of probation, defendant was required to "inform the probation officer of [his] place of residence and reside at residence approved by the probation officer." Defendant argues that the term requiring a probation officer's approval of his choice of residence interferes with his rights to privacy and travel and to freedom of association and must be stricken as unconstitutionally overbroad. We disagree.

Probation is a suspension of a sentence and a revocable grant of release conditioned upon supervision by a probation officer. (§ 1203, subd. (a).) Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety. (*People v. Welch* (1993) 5 Cal.4th 228, 233 (*Welch*).) Persons placed on probation by a court shall be under the supervision of the county probation officer who shall determine both the level and type of supervision consistent with the court-ordered conditions of probation. (§ 1202.8, subd. (a).) " 'Probation is not a right, but a privilege." (*In re York* (1995) 9 Cal.4th 1133, 1150, quoting *People v. Bravo* (1987) 43 Cal.3d 600, 608.) " '[I]f the defendant feels that the terms of probation are harsher than the sentence for the substantive offense[,] he is free to refuse probation.' " (*People v. Rubics* (2006) 136 Cal.App.4th 452, 459 (*Rubics*), disapproved on another ground as stated in *People v. Martinez* (2017) 2 Cal.5th 1093, 1099-1104, quoting *People v. Miller* (1967) 256 Cal.App.2d 348, 356.)

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) We review their decisions for abuse of discretion. A trial court abuses its discretion when the probation conditions imposed are arbitrary, capricious, or exceed the bounds of reason. (*Ibid*.) A condition will not be invalidated as unreasonable unless it satisfies each of the following criteria: (1) it has no relationship to the crime of which the offender was convicted; (2) it relates to conduct which is not itself criminal; and (3) it requires or forbids conduct which is not reasonably related to future criminality. (*People*

v. Lent (1975) 15 Cal.3d 481, 486 (*Lent*); *Carbajal*, at p. 1121.) The test is conjunctive. All three prongs must be satisfied before an appellate court will find it invalid. (*Lent*, at p. 486.) "[E]ven if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 380 (*Olguin*).) A condition of probation that enables a probation officer to effectively supervise a probationer is reasonably related to future criminality. (*People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240-1241 (*Kwizera*).)

Where there is a constitutional challenge based on vagueness or overbreadth, and the matter presents a pure question of law that can be resolved without resort to the record, the standard of appellate review is de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) However, not every term which requires a defendant to give up a constitutional right is per se unconstitutional. (*People v. Mason* (1971) 5 Cal.3d 759, 764-765, overruled on a different point as stated in *Lent*, *supra*, 15 Cal.3d at p. 486, fn. 1.) Probation conditions may place limits on constitutional rights if they are reasonably necessary to meet the twin goals of rehabilitation of the defendant and protection of the public. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 940-941 (*Bauer*).)

As pointed out by the People, defendant did not object to the residence approval condition at issue in the trial court. But where a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed

facts, it may be treated as a pure question of law, which is not forfeited by failure to raise it in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*); *Welch*, *supra*, 5 Cal.4th at p. 235.) The forfeiture doctrine *does* apply if the objection involves a discretionary sentencing choice or unreasonable probation conditions "premised upon the facts and circumstances of the individual case." (*Sheena K.*, at pp. 885, 888.) As such, we will only address defendant's overbreadth claim.

"If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355, quoting *People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) But an otherwise valid condition that impinges upon constitutional rights "must be carefully tailored, ' "reasonably related to the compelling state interest in reformation and rehabilitation . . . ." ' " (*Bauer*, *supra*, 211 Cal.App.3d at p. 942, quoting *In re White* (1979) 97 Cal.App.3d 141, 146 (*White*); accord, *Olguin*, *supra*, 45 Cal.4th at p. 379; *Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

A probation condition cannot be overbroad. (*Olguin*, *supra*, 45 Cal.4th at p. 384; *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "A restriction is unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it

imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Defendant argues the probation condition in question violates his rights to travel and to free association. Defendant relies primarily on *Bauer, supra*, 211 Cal.App.3d 937. We agree that these rights are constitutional and fundamental, and that the conditions curtail them. (*Bauer*, at p. 944.) However, we do not agree that the conditions violate the rights in the sense that the restrictions imposed are unreasonable or otherwise constitutionally impermissible. (*White, supra*, 97 Cal.App.3d at p. 146.) Insofar as probation is a grant of supervised release in lieu of confinement, virtually all probation conditions restrict these rights. " 'Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.' " [Citation.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.' [Citation.]" (*People v. Barajas* (2011) 198 Cal.App.4th 748, 753.) Since it is impossible to travel or to associate freely with persons of one's choice from inside a prison cell, probation is generally a great deal for the grantee. If defendant felt otherwise, he was free to refuse probation, and instead serve his sentence. (*Rubics, supra*, 136 Cal.App.4th at p. 459.)

In *Bauer*, the reviewing court struck a residence condition apparently designed to prevent the defendant from living with his overprotective parents. (*Bauer, supra*, 211

Cal.App.3d at p. 944.) Nothing in the record suggested the defendant's home life contributed to the crimes of which he was convicted (false imprisonment and simple assault), or that living at home reasonably related to future criminality. (*Ibid*.) The court concluded the probation condition impinged on the defendant's right to travel and freedom of association, and was extremely broad since it gave the probation officer the power to forbid the defendant "from living with or near his parents—that is, the power to banish him." (*Ibid*.)

The present case is distinguishable. *Bauer* concerned a 26-year-old man who had lived with his parents all his life. There was no evidence that his "exemplary" home life, or his parents, had contributed to his crime in any way. (*Bauer*, *supra*, 211 Cal.App.3d at p. 944.) Residing with one's parents, the court noted, is conduct not in itself criminal, and the probation department could not use the condition to "banish" the defendant from his parents. (*Id* at pp. 943-944.) The situation here is different. Banishment is not an issue. Unlike the condition in *Bauer*, the residence condition imposed here is not a wolf in sheep's clothing; it is not designed to banish defendant or to prevent him from living where he pleases. Moreover, unlike the defendant in *Bauer*, where defendant lives may directly affect his rehabilitation, considering his issues with controlled substances. Without a limitation placed by the residence condition or without supervision, for example, defendant could opt to live where drugs are used, sold, or manufactured. A probation officer supervising a person like defendant must reasonably know where he resides and with whom he is associating in deterring future criminality.

The residency condition is necessary under these circumstances to aid in defendant's rehabilitation, and not to banish defendant from any geographic region. The residency condition properly serves the state's interest in reformation and rehabilitation because where he lives will directly affect his rehabilitation. The nature of defendant's crimes suggests a need for oversight. Defendant in this case partly used his home to commit his crimes. He was transporting and selling methamphetamine to and from his home. Where he lives will directly affect his rehabilitation. Like the court in *Bauer*, we do not find that the condition itself is inappropriate in *all* circumstances (see *Bauer*, *supra*, 211 Cal.App.3d at p. 944 [finding residence approval condition not related to the defendant and his crimes in the case, but not invalidating the condition in every case]), but that such approval here was warranted as the requirement relates to defendant's future criminality and crimes.

Furthermore, the legal landscape has changed since *Bauer*, *supra*, 211 Cal.App.3d 937. *Bauer* was decided before our Supreme Court's decision in *Olguin*, *supra*, 45 Cal.4th 375, which held that a "condition of probation that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality.' " (*Id*. at pp. 380-381.) In *Olguin*, the defendant challenged a condition of probation requiring him to notify his probation officer of the presence of any pets at his residence. In part, the defendant challenged the condition on reasonableness grounds. The Supreme Court rejected the defendant's arguments, noting that "[t]he condition requiring notification of the presence of pets is reasonably related to future criminality because it

serves to inform and protect a probation officer charged with supervising a probationer's compliance with specific conditions of probation." (*Id*. at p. 381.)

The Supreme Court in *Olguin*, *supra*, 45 Cal.4th 375 also stated that "[a] probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' [Citation.]" (*Id*. at p. 382.) We view the residence approval condition here in light of *Olguin* and presume a probation officer will not withhold approval for irrational or capricious reasons. (*Id*. at p. 383.) A probation officer cannot issue directives that are not reasonable in light of the authority granted to the officer by the court. Thus, a probation officer cannot use the residence condition to arbitrarily disapprove a defendant's place of residence. The condition does not grant a probation officer the power to issue arbitrary or capricious directives that the court itself could not order. (See, e.g., *Kwizera*, *supra*, 78 Cal.App.4th at pp. 1240-1241 [a case concerning a condition requiring a probationer to obey directions from his probation officer].)

Moreover, as previously observed, "probation is a privilege and not a right, and that adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights—as, for example, when they agree to warrantless search conditions. [Citations.]" (*Olguin*, *supra*, 45 Cal.4th at p. 384.) "If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citation.]" (*Id*. at p. 379.) In sum, although the residency condition may restrict his movements and his choice of places to

live, requirement that defendant obtain his probation officer's approval of his residence is not unconstitutionally overbroad.

IV

DISPOSITION

We direct the clerk of the superior court to modify its minute order for the hearing held January 25, 2016, to clarify that the payment of costs of probation supervision, the court operations security assessment fee, and the court conviction assessment fee are not a condition of probation, but a separate court order. We will further direct the clerk of the superior court to modify its January 25, 2016 minute order to clarify that payment of the drug lab fee under Health and Safety Code section 11372.5 and the drug program fee under Health and Safety Code section 11372.7 are conditions of defendant's probation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.